

## **STRIKE AND SHARE: COMBATting FOREIGN INFLUENCE CAMPAIGNS ON SOCIAL MEDIA**

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## I. Foreign Influence Campaigns are Targeting U.S. Elections

*“The Russian government interfered in the 2016 election in sweeping and systematic fashion.”<sup>1</sup>*

When Russia sought to influence the 2016 U.S. election, one of its principal efforts took the form of a years-long propaganda campaign carried out on social media.<sup>2</sup> As early as 2014, the Internet Research Agency (“IRA”) and its employees operated social media accounts that targeted the United States, blending covert intelligence operations and overt efforts to execute a Russian messaging strategy emphasizing the most divisive political and social issues facing Americans.<sup>3</sup> When this effort first came to light, it was often innocuously described as “meddling.” But as more U.S. entities investigated and shared their findings with the American people, this effort to interfere in the focal point of our democracy came to be seen for what it was—information warfare.

In the words of the bipartisan U.S. Senate Select Committee on Intelligence:

In 2016, Russian operatives associated with the St. Petersburg-based Internet Research Agency (IRA) used social media to conduct an information warfare campaign designed to spread disinformation and societal division in the United States. . . . Masquerading as Americans, these operatives used targeted advertisements, intentionally falsified news articles, self-generated content, and social media platform tools to interact with and attempt to deceive tens of millions of social media

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<sup>1</sup> U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION: VOLUME I OF II 1 (2019), <https://go.usa.gov/xmV6R>.

<sup>2</sup> *Id.* at 14.

<sup>3</sup> *Id.*; OFFICE OF THE DIR. OF NAT’L INTELLIGENCE (“ODNI”), ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 2 (Jan. 6, 2017), <https://go.usa.gov/xmVFe>; S. SELECT COMM. ON INTELLIGENCE, 116th CONG., REPORT ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION VOLUME 2 (2019), <https://go.usa.gov/xdq3w>.

users in the United States. This campaign sought to polarize Americans on the basis of societal, ideological, and racial differences, provoked real world events, and was part of a foreign government's covert support of Russia's favored candidate in the U.S. presidential election.<sup>4</sup>

Russia deployed a large-scale troll farm to sow discord generally, but also to “undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency.”<sup>5</sup> This was not a one-off attack. By January 2017, the U.S. Intelligence Community had determined that Russia would apply lessons learned from its 2016 influence operation for use in future efforts against the United States and its allies.<sup>6</sup>

The Russian threat appears to have evolved. One of the Russian groups that hacked the Democratic National Committee in 2016 now operates through U.S.-based servers and another group appears to have thrown Western intelligence off the scent.<sup>7</sup> The IRA has adopted encrypted communication tools that American intelligence agencies cannot easily track, and they are paying Americans for use of their Facebook pages, circumventing Facebook’s already-weak efforts to keep foreigners from purchasing political ads.<sup>8</sup> Attempts to hack voter registries and electronic ballots pose threats to the brick-and-mortar voting infrastructure of the United States. Dis- and mis-information threaten another equally important kind of infrastructure—American citizens’ faith in their elections.<sup>9</sup>

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<sup>4</sup> *Id.* at 3 (footnote omitted).

<sup>5</sup> ODNI, *supra* note 3, at 1.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> Matthew Rosenberg, Nicole Perlroth & David E. Sanger, ‘Chaos Is the Point’: Russian Hackers and Trolls Grow Stealthier in 2020, N.Y. TIMES (Jan. 10, 2020), <https://nyti.ms/37UmDgF> [<https://perma.cc/RE85-AT2C>].

<sup>8</sup> *Id.*

<sup>9</sup> CAILIN O’CONNOR & JAMES OWEN WEATHERALL, THE MISINFORMATION AGE: HOW FALSE BELIEFS SPREAD 147–86 (2019) (explaining how social forces help false beliefs spread and cause harm); *see also* *Securing U.S. Election Infrastructure and Protecting Political Discourse: Hearing before the Subcomm. on National Security*

Russia's propaganda machine corrupted America's public debate by exacerbating and amplifying existing veins of polarization. It squeezed as many political pressure points as possible—immigration, LGBTQ rights, Black Lives Matter, gun rights<sup>10</sup>—and reached tens of millions of Americans through Facebook and Twitter in ways nobody foresaw.<sup>11</sup> This does not take into account the harder-to-detect spread of disinformation or mal-information<sup>12</sup> on peer-to-peer networks and messaging apps. Moreover, it does not include any other social media platforms that are growing in popularity, such as SnapChat, TikTok or Instagram.<sup>13</sup> When aggregated, the leading social media networks represent approximately 3.5 billion social media users worldwide—a figure that is sure to grow.<sup>14</sup> Roughly two-thirds of U.S. adults use Facebook and three-quarters use YouTube, with younger Americans

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*of the H. Comm. on Oversight and Reform*, 116th Cong. (2019) (Testimony of Ellen L. Weintraub, Chair, Fed. Election Comm'n), <https://go.usa.gov/xf88d>.

<sup>10</sup> Mike Isaac & Scott Shane, *Facebook's Russia-Linked Ads Came in Many Disguises*, N.Y. TIMES (Oct. 2, 2017), <https://nyti.ms/2TIOCSe> [<https://perma.cc/W3YG-PEHE>].

<sup>11</sup> In 2017, Facebook estimated that IRA-controlled accounts created content that reached at least 29 million U.S. persons. *Social Media Influence in the 2016 U.S. Election: Hearing Before the S. Select Comm. on Intelligence*, 115<sup>th</sup> Cong. 13 (2017). Facebook later estimated that 126 million U.S. users were exposed to political content produced by the Russians. O'CONNOR & WEATHERALL, *supra* note 9, at 169. Approximately 1.4 million Twitter users may have been contacted through IRA-controlled accounts. *Update on Twitter's Review of the 2016 US Election*, TWITTER: BLOG (Jan. 19, 2018), <http://bit.ly/37VNwks> [<https://perma.cc/GN4A-AKDF>].

<sup>12</sup> Some have made a distinction between false information that is propagated to inflict some harm (e.g., false news stories) and information based on reality that causes harm (e.g., stealing and then leaking embarrassing emails). *See, e.g.*, Claire Wardle & Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, COUNCIL OF EUR. (Sept. 27, 2019), <https://bit.ly/2SZpLC0> [<https://perma.cc/E93A-W7Q5>].

<sup>13</sup> As of July 2019, Facebook boasted over 2 billion active users, compared to Instagram's (owned by Facebook, Inc.) 1 billion active users, and TikTok's 500 million active users. *Global Social Media Overview*, DATAREPORTAL, <http://bit.ly/39VU840> [<https://perma.cc/5DNY-PCA7>].

<sup>14</sup> J. Clement, *Most Popular Social Networks Worldwide as of April 2020, Ranked by Number of Active Users*, STATISTA (Apr. 24, 2020), <http://bit.ly/2FFHrMV> [<https://perma.cc/A7MA-HBLY>].

using a variety of social media platforms on a daily basis.<sup>15</sup> The result is a larger American audience that is at least as vulnerable to malign foreign influence operations as it was four years ago.

And if the scale and diversity of social media fails to impress, consider that in 2016 a third of young Americans pointed to social media as the most helpful source of information about the 2016 presidential election.<sup>16</sup> That was more than their combined reliance on news websites and cable TV news.<sup>17</sup> This fact has not escaped the attention of political advertisers. Digital political ad spending for this election year is projected to reach \$2.8 billion.<sup>18</sup> The fragmentation of the public's sources of information, social media users' tendency to favor information that confirms pre-existing beliefs (*i.e.*, the "echo chamber" effect),<sup>19</sup> and the proliferation of social media platforms raises the possibility of a communications ecosystem that plays into the Russian strategy for propagating disinformation, which relies in part on high-volume and multichannel distribution.<sup>20</sup>

Nor is it just Russia that we have to worry about. Last year, seven law enforcement and national security agencies issued a Joint Statement on Ensuring Security of 2020 Elections, in which they warned:

Our adversaries want to undermine our democratic institutions, influence public sentiment and affect government policies.

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<sup>15</sup> Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR. (Mar. 1, 2018) <https://pewrsr.ch/2sf6dQX> [<https://perma.cc/YH3Q-YDFM>].

<sup>16</sup> Jeffrey Gottfried, *et al.*, *The 2016 Presidential Campaign – a News Event That's Hard to Miss*, PEW RES. CTR. (Feb. 4, 2016), <https://pewrsr.ch/36HBbQp> [<https://perma.cc/J52M-MWDZ>].

<sup>17</sup> *Id.*

<sup>18</sup> Alexandra Bruell, *Political Ad Spending Will Approach \$10 Billion in 2020, New Forecast Predicts*, WALL STREET JOURNAL (June 4, 2019 6:00 AM), <https://on.wsj.com/2NkchPh> [<https://perma.cc/72EL-Q93D>].

<sup>19</sup> Walter Quattrociocchi, Antonio Scala & Cass R. Sunstein, *Echo Chambers on Facebook 1-2* (June 13, 2016) (unpublished manuscript), <https://ssrn.com/abstract=2795110>.

<sup>20</sup> Christopher Paul & Miriam Matthews, *The Russian "Firehose of Falsehood" Propaganda Model: Why It Might Work and Options to Counter It*, RAND CORP. (June 20, 2016), <http://bit.ly/35J68Tg> [<https://perma.cc/7U3Z-P3VQ>].

Russia, China, Iran, and other foreign malicious actors all will seek to interfere in the voting process or influence voter perceptions. Adversaries may try to accomplish their goals through a variety of means, including social media campaigns, directing disinformation operations or conducting disruptive or destructive cyber-attacks on state and local infrastructure.<sup>21</sup>

All Americans, from the average Facebook user to government policymakers, should be concerned about the possibility that we are more vulnerable to malign foreign influence operations than we were in 2016. We all have an interest in combating such influence operations launched by foreign adversaries, especially the ongoing efforts to disrupt U.S. elections and undermine American democracy. The question for U.S. legislators and regulators is: do our government agencies have jurisdiction over foreign influence campaigns conducted through social media? If so, what can they do about it?

## II. The Law Against Contributions from Foreign Nationals

Determination to prevent foreign electoral influence is woven into the legal fabric of the United States. The threat of foreign influence animated debate about several sections of the United States Constitution, from the requirement that the president be a natural-born citizen,<sup>22</sup> to the Emoluments clause,<sup>23</sup> to the exclusive federal authority to enter into treaties,<sup>24</sup> to the establishment of the Electoral College,<sup>25</sup> to the number of members in the House of Representatives.<sup>26</sup> The Founders recognized the danger posed by foreign governments that

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<sup>21</sup> Joint Statement from DOJ, DOD, DHS, DNI, FBI, NSA, and CISA on Ensuring Security of 2020 Elections (Nov. 5, 2019), <https://www.cisa.gov/cisa/news/2019/11/05/joint-statement-doj-dod-dhs-dni-fbi-nsa-and-cisa-ensuring-security-2020>; *see also* Joint Statement From DOS, DOJ, DOD, DHS, ODNI, FBI, NSA, AND CISA On Preparations For Super Tuesday (March 02, 2020), <https://www.cisa.gov/news/2020/03/02/joint-statement-dos-doj-dod-dhs-odni-fbi-nsa-and-cisa-preparations-super-tuesday>.

<sup>22</sup> *See* THE FEDERALIST NO. 68 (Alexander Hamilton); U.S. CONST. art. II, § 2, cl. 5.

<sup>23</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>24</sup> *See* THE FEDERALIST NO. 3 (John Jay); U.S. CONST. art. I, § 10, cl. 1.

<sup>25</sup> *See* THE FEDERALIST NO. 68 (Alexander Hamilton); U.S. CONST. art. II, § 1, cl. 2.

<sup>26</sup> *See* THE FEDERALIST NO. 55 (James Madison); U.S. CONST. art. I, § 2, cl. 1.

would seek to influence this country and built fundamental safeguards against that threat.

That early concern over “foreign force and influence”<sup>27</sup> has not diminished. In 1938, Congress enacted the Foreign Agents Registration Act (“FARA”) to uncover efforts of foreign actors to influence the American political process.<sup>28</sup> Congress believed that FARA’s disclosure requirements would act as a deterrent by bringing out into the open the activities of those engaged by foreign entities “to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.”<sup>29</sup> In 1942, Congress amended FARA and expressly declared that the statute’s “policy and purpose” is “to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals.”<sup>30</sup>

The first ban on foreign spending in U.S. politics might be viewed as the Emoluments Clause of the Constitution.<sup>31</sup> In the campaign finance sphere, increasing concern about foreign political spending and a concomitant uptick in legislative responses marked the late 20<sup>th</sup> and early 21<sup>st</sup> centuries. In 1966, Congress passed a law prohibiting foreign governments and entities, and their agents, from making contributions to candidates seeking office.<sup>32</sup> When the Federal Election Campaign Act

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<sup>27</sup> See THE FEDERALIST NO. 2 (John Jay).

<sup>28</sup> Foreign Agents Registration Act of 1938, Pub. L. No. 75-583, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611-621); *see also* *Viereck v. United States*, 318 U.S. 236, 241 (1943) (“The general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment.”).

<sup>29</sup> H.R. REP. NO. 75-1381, at 2 (1937).

<sup>30</sup> Foreign Agents Registration Act of 1938, 56 Stat. 248-49 (1942).

<sup>31</sup> U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”).

<sup>32</sup> See Pub. L. No. 89-486, § 8, 80 Stat. 244, 248-49 (1966).

(“FECA”) was amended in 1974, Congress extended the prohibition to include all foreign nationals.<sup>33</sup> Later, to ensure that foreign nationals would not gain access to American politicians through soft-money donations to political parties, Congress took another step toward eliminating foreign influence from American politics. As part of the 2002 Bipartisan Campaign Reform Act (commonly known as the McCain-Feingold law), Congress broadened the foreign national prohibition, banning foreign nationals from making political expenditures and contributing to political parties.<sup>34</sup>

To put the present state of the law succinctly: “it is illegal for any person to solicit, accept, or receive anything of value from a foreign national in connection with a U.S. election.”<sup>35</sup> The law explicitly prohibits foreign nationals from making or promising to make political contributions or donations, paying for electioneering communications, or making any other “expenditure, independent expenditure, or disbursement in connection with any Federal, State, or local election.”<sup>36</sup> The broad scope of the phrase “anything of value” has been affirmed by courts, which have defined it to include “goods and services that have tangible, intangible, or even *merely perceived* benefits, for example: promises, information, testimony, conjugal visits, and commercially worthless stock.”<sup>37</sup> The Federal Election Commission has specifically construed

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<sup>33</sup> See Pub. L. No. 93-443, § 101(d), 88 Stat. 1263, 1267 (1974).

<sup>34</sup> See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96 (2002).

<sup>35</sup> CHAIR ELLEN L. WEINTRAUB, FED. ELECTION COMM’N, STATEMENT REGARDING ILLEGAL CONTRIBUTIONS FROM FOREIGN GOVERNMENTS (2019), <https://go.usa.gov/xy38U>; see also 52 U.S.C. § 30121(a)(2) (2002); *Draft Interpretive Rule Concerning Prohibited Activities Involving Foreign Nationals*, FED. ELECTION COMM’N, Agenda Doc. No. 19-41-A (made public on Sept. 26, 2019), <https://go.usa.gov/xphmf>.

<sup>36</sup> 11 C.F.R. § 110.20(f); see also *id.* at § 110.20 (b)–(j); 52 U.S.C. § 30121. For the definitions of electioneering communications, expenditures, and independent expenditures, see 52 U.S.C. §§ 30104(f)(3), 30101(9), and 30101(17) (2002).

<sup>37</sup> CHAIR ELLEN L. WEINTRAUB, FED. ELECTION COMM’N, THE LAW OF A ‘THING OF VALUE’ (2019), <https://go.usa.gov/xphmF> (listing tangible and intangible goods and services that qualify as contributions).



it to encompass such items as opposition research, staff time, polling results, and advertising services.<sup>38</sup>

The U.S. government's strong interest in enforcing this broad prohibition is spelled out in *Bluman v. FEC*.<sup>39</sup> That case upheld the constitutionality of the ban on foreign-national contributions and recognized that foreign citizens should play no part in "activities of democratic self-government."<sup>40</sup> The Supreme Court summarily affirmed then-Judge Brett Kavanaugh's reasoning when he concluded that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."<sup>41</sup> It is noteworthy that the facts of this case involved two individuals residing and working in the U.S. who wanted to donate a grand total of \$700 and the cost of copying some flyers to be handed out in Central Park. Yet the Court found the government interest in prohibiting this activity by foreign actors to be "compelling." How much more compelling, then, must be our concern about a multimillion dollar election-related influence campaign carried out on social media by a foreign nation-state adversary.

That interest animates parts of Robert S. Mueller's report on Russia's electoral interference and the prosecution of criminal violations of the foreign-national political spending ban.<sup>42</sup> But enforcing the ban on foreign national contributions through criminal prosecution is not always feasible,<sup>43</sup> and the FEC's civil enforcement mechanism does not

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<sup>38</sup> *Id.*

<sup>39</sup> *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

<sup>40</sup> *Id.* at 288.

<sup>41</sup> *Id.* (writing for a three-judge panel).

<sup>42</sup> 52 U.S.C. § 30121 (2002); U.S. DEP'T OF JUSTICE, *supra* note 1, at 14; *see also*, e.g., *United States v. Singh*, 924 F.3d 1030, 1061 (9th Cir. 2019) (affirming convictions for violations of § 30121); *Sealed Indictment, United States v. Parnas*, No. 19-cr-725 (S.D.N.Y. Oct. 9, 2019), <https://go.usa.gov/xphVH> (seeking convictions for *inter alia* alleged violations of § 30121).

<sup>43</sup> *Cf. Indictment, United States v. Internet Research Agency*, No. 18-cr-32 (D.D.C. Feb. 16, 2018) (charging defendants under Title 18 in connection with the IRA's foreign influence campaign, but bringing no charges on campaign-finance

seem more likely to achieve the desired deterrent effect on foreign governments. Moreover, neither option does much, if anything, to mitigate the immediate harmful effects of malign foreign influence operations. The social-media platforms have taken some steps to self-regulate. But the challenge of self-regulation is that different platforms may undertake disparate solutions, and those solutions tend not to infringe on their core business models or financial incentives. Nor can the public be assured that self-regulatory efforts may not lag once the spotlight is removed from the platforms' undertakings. Government has a role to play here.

Clearly any government action must be taken with due regard to First Amendment concerns. But as the *Bluman* decision notably observed, upholding the constitutionality of the McCain-Feingold law's strengthened foreign national spending ban did not implicate the "great debates" over the First Amendment ramifications of campaign finance laws. "Rather, this case raise[d] a preliminary and foundational question about the definition of the American political community and, in particular, the role of foreign citizens in the U.S. electoral process."<sup>44</sup> The court held that "[a] statute that excludes foreign nationals from political spending," from acts "directly targeted at influencing the outcome of an election," served "the compelling interest of limiting the participation of *non-Americans* in the activities of democratic self-government" and "preventing foreign influence over the U.S. government."<sup>45</sup> A law that does so "readily passes constitutional muster."<sup>46</sup>

Moreover, in a recent Supreme Court case, now-Justice Kavanaugh asserted for the Court (in another context, but quite unequivocally) that "foreign organizations operating abroad have no First Amendment rights."<sup>47</sup> If that is true under the facts of that case, of private

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violations); see also Bob Bauer, *The Failures of the Mueller Report's Campaign Finance Analysis*, JUST SECURITY (May 3, 2019), <http://bit.ly/36KyZaR>.

<sup>44</sup> *Bluman*, 800 F. Supp. 2d at 286.

<sup>45</sup> *Id.* at 289-90.

<sup>46</sup> *Id.* at 283.

<sup>47</sup> *Agency for Intl. Dev. v. Alliance for Open Socy. Intl., Inc.*, 207 L. Ed. 2d 654, 660 (2020).

organizations with United States affiliates, closely enough allied to U.S. interests to be receiving U.S. funding, it cannot be less true of foreign governments operating from foreign countries to undermine our democracy, or those acting on their behalf.

### III. What Can We Do About It?

Members of Congress have not been bereft of ideas for shoring up the laws to detect, deter, or sanction malign foreign influence operations in U.S. elections, but actual statutory change has proven elusive. The Defending Elections from Threats by Establishing Redlines (DETER) Act, for example,<sup>48</sup> would require an intelligence assessment after every election on whether foreign governments or their agents interfered in the election and would impose strong sanctions on any who did so. Such strong deterrence measures are critically important given that the techniques our adversaries use are likely to change over time, and we cannot be certain that we will detect them in real time. The Honest Ads Act<sup>49</sup> goes after disinformation campaigns by subjecting digital advertising to the same type of disclosure rules that apply to broadcast ads and requiring broadcasters and platforms to take reasonable steps to ensure that political ads are not purchased by foreign nationals. The Shell Company Abuse Act<sup>50</sup> would criminalize the use of corporations to hide foreign spending in U.S. elections, a risk that is far from hypothetical.<sup>51</sup> These are just a few of the dozens of bills that have been introduced in Congress since 2016 aimed at addressing the threat of foreign interference in U.S. elections. All of the bills described in this paragraph have bipartisan support. None have passed into law.

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<sup>48</sup> S. 1060, 116th Cong. (2019), <https://go.usa.gov/xf8VT>.

<sup>49</sup> S. 1356, 116th Cong. (2019), <https://go.usa.gov/xf8VK>; HR 2592, 116th Cong. (2019), <https://go.usa.gov/xf8VR>.

<sup>50</sup> S. 2939, 115th Cong. (2018), <https://go.usa.gov/xf8Vs>.

<sup>51</sup> See, e.g., MUR 7122 (APIC / Right to Rise USA) (FEC enforcement action concerning \$1.3 million foreign national contribution to super PAC through domestic subsidiary of Chinese company): FED. ELECTION COMM'N, CONCILIATION AGREEMENT: IN RE RIGHT TO RISE USA (2018), <https://go.usa.gov/xf8dJ>; FED. ELECTION COMM'N, CONCILIATION AGREEMENT: IN RE AMERICAN PACIFIC INTERNATIONAL CAPITAL (2018), <https://go.usa.gov/xf8vc>.

The Federal Election Commission is empowered to issue rules necessary to carry out the existing ban on foreign national contributions that is part of the FECA.<sup>52</sup> Numerous times over the last decade, efforts by Democratic FEC commissioners (including one of the authors) to launch a rulemaking to staunch potential avenues of foreign spending in our elections have been stymied.<sup>53</sup> Even a proposal to address political spending by domestic corporations *wholly owned by foreign governments* failed to obtain the requisite bipartisan support to commence the rulemaking process.<sup>54</sup>

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<sup>52</sup> See 52 U.S.C. § 30107(a)(8) (describing the Commission's rulemaking powers).

<sup>53</sup> See, e.g., Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations (Draft A), FEC Agenda Document No. 11-02 (Jan. 20, 2011), [http://www.fec.gov/agenda/2011/mtgdoc\\_1102.pdf](http://www.fec.gov/agenda/2011/mtgdoc_1102.pdf); Cynthia L. Bauerly & Ellen L. Weintraub, Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations (revised), Agenda Document No. 11-33 (June 15, 2011), [http://www.fec.gov/agenda/2011/mtgdoc\\_1133.pdf](http://www.fec.gov/agenda/2011/mtgdoc_1133.pdf); Ann M. Ravel & Ellen L. Weintraub, Petition for Rulemaking, Agenda Document 15-31-B (June 8, 2015), [https://www.fec.gov/resources/updates/agendas/2015/mtgdoc\\_15-31-b.pdf](https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-31-b.pdf) (see also Notice of Availability and Petition for Rulemaking on Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (*Citizens United*) filed by Ann M. Ravel and Ellen L. Weintraub, Agenda Document 15-31-A, [https://www.fec.gov/resources/updates/agendas/2015/mtgdoc\\_15-31-a.pdf](https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-31-a.pdf)); Ann M. Ravel & Ellen L. Weintraub, Motion to Open a Rulemaking in REG 2015-04 in Response to Public Comment, Agenda Document No. 15-65-A (Dec. 17, 2015), [http://www.fec.gov/agenda/2015/documents/mtgdoc\\_15-65-a.pdf](http://www.fec.gov/agenda/2015/documents/mtgdoc_15-65-a.pdf); Ellen L. Weintraub, Proposal to Launch Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence, FEC Agenda Document 16-40-A (Sept. 9, 2016), [https://www.fec.gov/resources/updates/agendas/2016/mtgdoc\\_16-40-a.pdf](https://www.fec.gov/resources/updates/agendas/2016/mtgdoc_16-40-a.pdf); Ellen L. Weintraub, Revised Proposal to Launch Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence, FEC Agenda Document 16-49-A (Sept. 28, 2016), [https://www.fec.gov/resources/updates/agendas/2016/mtgdoc\\_16-49-a.pdf](https://www.fec.gov/resources/updates/agendas/2016/mtgdoc_16-49-a.pdf); Ellen L. Weintraub, Rulemaking Proposal to Combat Foreign Influence in U.S. Elections, Agenda Document No. 18-26-A, (May 17, 2018), [https://www.fec.gov/resources/cms-content/documents/mtgdoc\\_18-26-a.pdf](https://www.fec.gov/resources/cms-content/documents/mtgdoc_18-26-a.pdf).

<sup>54</sup> See Minutes of FEC Open Meeting of January 12, 2017, at 7-11, [https://www.fec.gov/resources/cms-content/documents/January\\_12\\_2017\\_Open\\_Meeting.pdf](https://www.fec.gov/resources/cms-content/documents/January_12_2017_Open_Meeting.pdf).

Meanwhile, technology companies, left to their own (metaphorical) devices to respond to abuses of their platforms, have adopted varying and evolving approaches, but have not staved off criticism. Facebook, having failed to notice that political ads were being paid for in rubles in 2016, now requires verification from payors. It has built an ad library (although researchers have criticized it as difficult to use). Having requested in 2011 that its ads be exempted from FEC disclaimer requirements, it now accommodates them.<sup>55</sup> Facebook has also added information about who is behind its pages and their primary country location<sup>56</sup> and adopted policies of first labeling and then banning ads from state-controlled media that target people in the U.S.<sup>57</sup> It has failed, however, to appease critics from the civil rights community that its platform has been used as a venue for misinformation, hate speech, and voter suppression by malign actors both foreign and domestic.<sup>58</sup> In late 2019, Twitter abandoned the field of political advertising, but was almost immediately criticized for inconsistent application of its self-imposed ban.<sup>59</sup>

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<sup>55</sup> Compare FEC Advisory Opinion Request 2011-09, <https://www.fec.gov/files/legal/aos/2011-09/1174825.pdf>, with FEC Advisory Opinion 2017-12, <https://www.fec.gov/files/legal/aos/2017-12/2017-12.pdf>.

<sup>56</sup> Guy Rosen, Katie Harbath, Nathaniel Gleicher & Rob Leathern, *Helping to Protect the 2020 US Elections*, FACEBOOK: ABOUT (Oct. 21, 2019), <https://about.fb.com/news/2019/10/update-on-election-integrity-efforts/>.

<sup>57</sup> Nathaniel Gleicher, *Labeling State-Controlled Media on Facebook*, FACEBOOK: ABOUT (June 4, 2020), <https://about.fb.com/news/2020/06/labeling-state-controlled-media/>.

<sup>58</sup> See, e.g., Shin Inouye, *Facebook's Civil Rights Audit Shows Need for Reforms*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (July 8, 2020), <https://civilrights.org/2020/07/08/facebooks-civil-rights-audit-shows-need-for-reforms/>; Mike Isaac, *Facebook's Decisions Were 'Setbacks for Civil Rights,' Audit Finds*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/technology/facebook-civil-rights-audit.html>; Yaël Eisenstat, *How to Combat Voter Suppression*, BROOKINGS (June 25, 2020), <https://www.brookings.edu/techstream/how-to-combat-online-voter-suppression/>.

<sup>59</sup> Aaron Holmes, *Climate Groups Can't Run Ads about Global Warming on Twitter, But Exxon Can*, BUS. INSIDER (Nov. 8, 2019, 10:37 AM), <https://www.businessinsider.com/twitter-ads-global-warming-climate-change-exxon-elizabeth-warren-2019-11>.

The technology industry should not be left entirely to self-regulation, but it must be part of the solution. Addressing sophisticated foreign influence campaigns will require ongoing efforts and a multi-stakeholder approach. These are just a few suggestions. While malign foreign actors are spreaders of disinformation, they are not the only ones. They have domestic predecessors and copycats. In order to address disinformation, the conduct of domestic actors will necessarily be implicated in some of these recommendations.

#### **a. The Foreign National Political Spending Ban**

Congress should pass the Honest Ads Act. This would subject online ads to the same disclosure regime as broadcast ads, would standardize and make mandatory the now voluntary maintenance of digital ad libraries, and would require the platforms to take reasonable steps to prevent foreign nationals from purchasing online political ads. It would also update the FECA's disclaimer requirements to explicitly address online ads, leapfrogging a long-stalled regulatory project that has been on the Commission's agenda since 2011.<sup>60</sup>

As noted above, the foreign national political spending ban prohibits foreign nationals from making disbursements for electioneering communications. Electioneering communications are currently defined as *broadcast, cable, and satellite communications* disseminated within narrow time windows (within 30 days of the candidate's primary or 60 days of the general election) that refer to a clearly identified Federal candidate and are targeted to that candidate's electorate.<sup>61</sup> The Honest

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<sup>60</sup> See CHAIR ELLEN L. WEINTRAUB, FED. ELECTION COMM'N, THE LAW OF INTERNET COMMUNICATION DISCLAIMERS (2019), <https://www.fec.gov/resources/cms-content/documents/2019-12-18-The-Law-of-Internet-Communication-Disclaimers.pdf>.

<sup>61</sup> 11 C.F.R. § 100.29(a) (52 U.S.C. § 30104(f)(3)) ("Electioneering communication means any broadcast, cable, or satellite communication that: 1. Refers to a clearly identified candidate for Federal office; 2. Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and 3. Is

Ads Act would extend the definition to include communications “placed or promoted for a fee on an online platform.” This would clarify that the ban on foreign nationals purchasing election-related advertising includes online advertising. It would also put some onus on the platforms, who are best positioned to know who is purchasing their ads, to adopt procedures to ensure they are not selling political ads to foreign nationals.

### **b. Microtargeting Political Ads**

If foreign influence campaigns thrive on the echo chambers created by insular social networks, then one avenue of attack is to pop those information bubbles. Microtargeting allows advertisers to draw upon the vast trove of personal data amassed by the platforms to aim with laser-like focus at precisely the targets, and only those targets, who will be most susceptible to biased and misleading messages. Because these ads are disseminated so narrowly, they avoid the scrutiny of those likely to raise contrary points of view and engage in counterspeech. Putting an end to the microtargeting of political ads would broaden online conversations. It would expand rather than limit the potential for wide-open, robust political debate. It could thus mitigate some of the worst tendencies of unscrupulous online actors, including the propagandists behind foreign influence campaigns. By eliminating microtargeting, social media platforms would enhance transparency, make disinformation more visible, and incentivize discourse that unifies broad audiences instead of polarizing narrow ones.<sup>62</sup>

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targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.”).

<sup>62</sup> See Ellen L. Weintraub, *Don't Abolish Political Ads on Social Media. Stop Microtargeting.*, WASH. POST, Nov. 1, 2019, <https://wapo.st/30dDqc7> [<https://perma.cc/98XF-B9XK>]; Yaël Eisenstat, *I Worked on Political Ads at Facebook. They Profit by Manipulating Us*, WASH. POST (Nov. 4, 2019), <https://www.washingtonpost.com/outlook/2019/11/04/i-worked-political-ads-facebook-they-profit-by-manipulating-us/> [<https://perma.cc/T47F-V8V8>]; Peter Kafka, *Facebook's Political Ad Problem, Explained by an Expert*, VOX (Dec. 10, 2019, 8:00 AM), <https://www.vox.com/recode/2019/12/10/20996869/facebook-political-ads-targeting-alex-stamos-interview-open-sourced> [<https://perma.cc/8PE4-Z24W>].

Twitter has banned all political ads on its platform.<sup>63</sup> We view this as a step too far. It is concerning when an entire platform is shut off as a channel for a type of political communication. Google changed its ad policy to disallow targeting based on public voter records or political affiliations, or targeted more narrowly than zip code, age, and gender. This is still more narrow than we would ideally prefer, but it is an important step, given that Google's digital advertising platform accounts for more than 37% of all digital advertising in the United States.<sup>64</sup> Facebook, however, accounts for 22% of digital spending and almost 70% of U.S. adults are on that social network, and as of the completion of this article, Facebook was resisting entreaties to end microtargeted political ads.<sup>65</sup> Facebook plans to introduce a way for its users to opt out of political ads, but most users are likely to stick with default settings.<sup>66</sup> As this article went to press, there were rumors that Facebook was considering abandoning all political advertising, but they were unconfirmed.<sup>67</sup> As noted above with respect to Twitter, we believe that political advertising should not be banned from platforms altogether, but rather, that the platforms should allow advertising but not microtargeting. Two bills have been introduced in Congress that would ban microtargeted political ads.<sup>68</sup>

### c. The Role of Algorithms

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<sup>63</sup> Jack Dorsey (@Jack), TWITTER (Oct. 30, 2019, 4:05 PM), <https://twitter.com/jack/status/1189634360472829952>.

<sup>64</sup> Some concerns remain over whether third parties who purchase ads through Google's Display Network—reaching over 90% of all internet users—may use their own targeting tools to reach narrow audiences.

<sup>65</sup> Tony Romm, Isaac Stanley-Becker & Craig Timberg, *Facebook Won't Limit Political Ad Targeting or Stop False Claims Under New Ad Rules*, WASH. POST (Jan. 9, 2020, 2:24 PM), <https://wapo.st/37Qeqds> [<https://perma.cc/5LZN-B4BP>].

<sup>66</sup> *Id.*

<sup>67</sup> Mike Isaac, *Facebook Said to Consider Banning Political Ads*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/technology/facebook-political-ads-ban.html> [<https://perma.cc/6T6H-2RMC>].

<sup>68</sup> Protecting Democracy from Disinformation Act, H.R. 7012, 116th Cong. (2020); Banning Microtargeted Political Ads Act, H.R. 7014, 116th Cong. (2020).



For all its benefits, eliminating microtargeting for political ads runs the risk of ceding more power to the algorithms that determine who sees political advertising.<sup>69</sup> Facebook's ad delivery system appears to skew ad delivery based on the political leanings of targeted users, which factor in the ad delivery optimization algorithms run by the platform.<sup>70</sup> Removing microtargeting tools from the hands of advertisers may be ineffective if ad delivery algorithms automatically create the same kind of insulated audiences. And creating more diverse audiences discourages the kind of social network environment that malign foreign operations have exploited.

The real problem with the platforms' algorithms is a larger issue than how ads are delivered. It goes to how all content is delivered. The platforms' business imperative is to keep people on the platform (viewing more ads). The most effective way of doing so, the platforms have learned, is to serve up a steady diet of emotionally charged content. Enragement is engagement. The outrage machine that is a typical social media feed exacerbates divisions and polarization in our society and creates fertile ground for disinformation from domestic and foreign sources. The platforms have yet to fully acknowledge or grapple with the negative aspects of the role they play in our politics and democracies around the globe.

#### **d. Fakes, Manipulated Media, and Bots**

Facebook generally allows intentionally misleading political content on its platform.<sup>71</sup> With the exception of content that promotes voter

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<sup>69</sup> Muhammad Ali, et al., *Ad Delivery Algorithms: The Hidden Arbiters of Political Messaging* (Dec. 17, 2019) (unpublished manuscript), <http://bit.ly/37ZFpU4>; see also Isaac Stanley-Becker, *Facebook's Ad Tools Subsidize Partisanship, Research Shows. And Campaigns May Not Even Know It.*, WASH. POST (Dec. 10, 2019, 8:00 AM), <https://wapo.st/39YXiUR> [<https://perma.cc/J7BT-9KVF>].

<sup>70</sup> Ali, et al., *supra* note 69, at 10.

<sup>71</sup> Nick Clegg, *Facebook, Elections and Political Speech*, FACEBOOK: ABOUT (Sept. 24, 2019), <http://bit.ly/35NKIKb> [<https://perma.cc/JA6Q-GFZY>]; Kate Cox, *Political Ads Can Lie If They Want, Facebook Confirms*, ARS TECHNICA (Oct. 10, 2019, 12:55 PM), <http://bit.ly/35NK2z1> [<https://perma.cc/VDT2-LBCC>].

suppression, Facebook exempts politicians from its third-party fact-checking program.<sup>72</sup> And while Facebook provides an ad library that promises to provide greater transparency with regard to the identity of the people behind the online ads seen by users,<sup>73</sup> it is unrealistic to assume that malign foreign influence campaigns will not hide behind straw accounts or that the average Facebook user will spend time poring through their ad library. Unless social media networks are willing to take down disinformation or manipulated media, their users are susceptible to deceptive content produced in furtherance of malign foreign influence operations.

Does Facebook delete fake content? Sometimes. A deepfake video that does not violate Facebook's Community Standards but is nevertheless rated false by its fact-checkers will not be deleted.<sup>74</sup> The distribution of that deepfake is slowed, however, and when users see or share it, they will be alerted of its falsity. Yet some manipulated media may freely flow through the social network. Crudely altered videos manipulated with video-editing software and not the product of artificial intelligence or machine learning—also known as “shallowfakes” or “cheapfakes”—are not covered by Facebook's policy. Take as an example the video of House Speaker Nancy Pelosi that was slowed to make it appear that she was slurring her words. Facebook allows users to view and share that cheapfake as if it were the real McCoy.

We believe, as a matter of good corporate citizenship, that social media platforms should remove demonstrably false content, not merely flag it or slow its spread. This is one of a very solid set of recommendations from Paul Barrett of NYU to combat disinformation.<sup>75</sup> We're not talking here about mere spin, but provably false content, such as anti-

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<sup>72</sup> Clegg, *supra* note 71.

<sup>73</sup> Rob Leathern, *Expanded Transparency and More Controls for Political Ads*, FACEBOOK: ABOUT (Jan. 9, 2020), <http://bit.ly/35IwlRE> [<https://perma.cc/7V3H-K5BY>].

<sup>74</sup> Monika Bickert, *Enforcing Against Manipulated Media*, FACEBOOK: ABOUT (Jan. 6, 2020), <http://bit.ly/2R8FUUV> [<https://perma.cc/8PA6-LMLC>].

<sup>75</sup> PAUL M. BARRETT, NYU STERN CTR. FOR BUS. & HUM. RTS., TACKLING DOMESTIC DISINFORMATION: WHAT THE SOCIAL MEDIA COMPANIES NEED TO DO (2019), <http://bit.ly/36MKAXf>.

vaccination or Pizzagate-style conspiracy theories. The public sphere does not benefit from the spread of disinformation. Complaints from the platforms that they do not want to be the arbiters of truth fall flat. Like it or not, they are already playing that role. They have fact checkers. The problem is that fact-checking is deployed inconsistently, both within and across platforms.

Decision-making in these areas should not fall to single powerful individuals. Mark Zuckerberg is correct that *he* should not personally be the arbiter of truth. What is needed is an industry-wide standards board to identify and recommend removal of blatantly false content. This board should be comprised of entities across the political spectrum with their own stringent and respected fact-checking standards. Facebook's outside oversight board, while stocked with impressive individuals, appears to be focused on the other side of the problem, complaints that too much material is being taken down. It is important to have such an appeals board, but that is a solution to a different problem.

Government actors should focus their efforts on improving disclosure requirements. Congress should require the identification and labeling of false information and manipulated media. This type of disclosure should pass constitutional muster, as a disclosure mechanism analogous to those that have previously been upheld as essential to an informed electorate.<sup>76</sup>

Finally, one problem that government and the private sector should work together to address is the prevalence of bots on social networks. The platforms have taken some steps to remove inauthentic accounts, and that is to be encouraged. We would support legislation to incentivize more vigorous action. We do not believe that even a Court that has held that corporations have First Amendment rights would extend those rights to bots. In any event, it seems a risk worth taking. No one wants to get their information from a Russian troll or an inanimate bot.

#### **e. Public Technologists**

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<sup>76</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 913-14 (2010).

It is not enough to convene panels of experts to discuss policy solutions or receive their input sporadically through the comments in rulemakings. Government needs to up its game across the board and hire more data scientists, technologists, and cybersecurity experts. Having in-house experts within federal agencies can mean the difference between sensible, impactful policy solutions and doomed-to-fail regulation. For its part, the FEC should dedicate personnel to the task of studying technological challenges, including the digital infrastructure that social media networks have created and that foreign adversaries seek to abuse. Obviously, the FEC already has a sophisticated IT department, whose job it is to secure the FEC's confidential information and maintain its vast public database. What we need – and what we believe all government agencies would benefit from – are dedicated technologists to increase our capacity to innovate and adopt smart technology policies. Moreover, we view it as a weakness that no one at the FEC currently holds a security clearance. We believe the U.S. government's response to malign foreign influence operations should include the FEC, and that commissioners and senior managers should be able to receive relevant briefings from the Intelligence Community.<sup>77</sup>

#### IV. Conclusion

Malign foreign influence operations represent a grave and ongoing threat to American democracy. It is tempting, where political speech and complicated technology is involved, to take a *laissez-faire* approach and hope that all ends well. The risk, however, is too great that Americans will end up with political debates that they cannot trust, elections that are robbed of their legitimacy, and policies that are covertly manipulated by foreign interference. Government policymakers in both the legislative and executive branches owe a duty to the American people to grapple with the technical and legal challenges that arise when foreign influence campaigns spread on social media. Failure to do so

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<sup>77</sup> At least one bill has been introduced in the Senate that would synchronize intelligence efforts regarding foreign influence operations and coordinate policies and responses with relevant federal departments and agencies. *See* Combating Foreign Influence Act of 2019, S. 2493, 116th Cong. § 119C (2019), <https://go.usa.gov/xphFs> [<https://perma.cc/PEW4-9ZJW>].

could mean surrendering to foreign efforts to exacerbate division and polarization and subvert both democracy and truth, straining our common bonds and sabotaging our efforts to come together to solve the serious problems we face.